Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JEFFERY D. WATKINS

Petitioner,

v.

ROADWAY EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Jeffery D. Watkins ("Watkins" or "Petitioner") is a disabled American who is entitled to the protections of the ADA because he can perform the essential functions of his job with reasonable accommodations despite his disability. Watkins is entitled to the damages awarded to him by the jury and trial court, including punitive damages.

Roadway Express, Inc. ("Roadway") claims that Watkins is not disabled but that his permanent injuries are so severe that he cannot perform any job at Roadway Express. Such an argument is an admission by Roadway Express that Watkins cannot perform a broad class of jobs and the Fifth Circuit erred by overturning the jury's finding and the trial court's Final Judgment in this case.

The question presented for review is whether Watkins is protected by the ADA and entitled to all damages awarded to him by the jury?

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PETITION FOR A WRIT OF CERTIORARI

Watkins respectfully petitions that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on August 30, 2001, in order to resolve the conflict among Courts in different circuits on the important issues presented herein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unpublished by order of the Fifth Circuit. It is reprinted in Appendix A hereto ("App. A"). The Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division is reprinted in Appendix B hereto ("App. B").

STATEMENT OF JURISDICTION

The Court of Appeals entered its Opinion on August 30, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, 42 U.S.C. § 12112(a) provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

STATEMENT OF THE CASE

On September 7, 2000, the jury handed down its verdict in this case, finding that Watkins was a qualified person with a disability, against whom Roadway intentionally discriminated by failing to provide him with a reasonable accommodation, and that Roadway violated the ADA with malice or reckless indifference to Watkins' rights. The jury awarded Watkins $45,500 in compensatory damages and $450,000 in punitive damages.

On December 26, 2000, the trial court entered Final Judgment for $45,500 in compensatory damages, $58,024 in back pay, and ordered reinstatement with reasonable accommodations. App. B. On January 26, 2001, the trial court entered an award of $91,843.25 for Watkins' attorney's fees.

On August 30, 2001, the Fifth Circuit reversed and rendered judgment in favor of Roadway, finding that Watkins was not disabled.

Watkins Is Disabled.

Watkins was employed by Roadway as a dockworker and driver. Watkins injured his back at Roadway on June 29, 1995. Watkins was attempting to roll a box weighing 175 to 185 pounds when he hurt his back. Watkins received treatment for his injury. He received physical therapy, facet injections, a rhizotomy, and two disk fusions. The fusions involved taking the disks out, replacing them with bone, and inserting pins and wiring to hold it all together. Watkins still has pedicle screws, pins and cables in his back. Watkins suffers from permanent degenerative disk disease and muscle

problems. Watkins suffers from a permanent musculoskeletal disability. Furthermore, Watkins' doctors found that his disorder affected his musculoskeletal system, which is specifically listed in 29 C.F.R. § 1630.2(h) as a physical or mental impairment encompassed by the term disability.

Watkins received a 16% disability rating on June 26, 1997, at which point Watkins' doctor certified that Watkins had reached his maximum medical improvement. Furthermore, Petitioner had lifting restrictions of 20 pounds.

Petitioner applied for Social Security disability benefits. Social Security found that Petitioner was totally and permanently disabled. Petitioner was under a total impairment disability rating from Social Security when he first went back to Respondent with a release to return to work in July 1997. Such a finding constitutes not only a physical impairment but a record of impairment as well.

It was during this time period, when Watkins had been declared disabled by the Social Security Administration, on July 10, 1997, that Roadway Express refused to allow Watkins to return to work even though Watkins showed them his doctor's release showing that he could work light duty or work with accommodations.

Roadway Express refused to return Petitioner to light duty, refused to return Petitioner to his job as a driver or as a dock worker, and also refused to consider Petitioner for any other vacant positions that he was able to perform.

Petitioner's Limitations.

Petitioner's disability has substantially limited Petitioner's major life activities, including working, lifting, performing manual tasks, sleeping and sexual activities. Watkins testified that his disabilities limit his working at Roadway. Because of his medical diagnosis, Watkins received Social Security Disability Benefits, and was found to be disabled by the Social Security Administration during this entire period of time. Such disability was total and thus applied to *every class of job*, not just one job.

Watkins' disabilities affect other life activities as well:

> Just enjoyment of life, being able to do functions that I have normally done, you know with my family. Playing softball, you know, and outings that we might do. Out running, exercising. Just activities that a normal person might do with your – their family for recreation.

Watkins testified that he used to use exercise and activity to maintain his health. Watkins can no longer run. Watkins can drive himself only for short distances. Watkins can no longer play basketball or softball. Watkins can no longer work on or do maintenance on his vehicles. Watkins used to haul hay for extra money, which he can no longer do. Watkins has problems sleeping. Watkins is restricted with regard to his sexual relationship with his wife.

Performing the Essential Functions of His Job.

Watkins testified that he could perform all the jobs at Roadway, and that he has the seniority to hold these jobs.

Watkins is able to perform the forklift driver job, the switcher job, the dock worker job, and the drop and hook job. Watkins described in great detail the essential functions of the jobs of switcher, drop and hook, forklift driver and dock worker, and testified that he could perform the essential functions of all jobs even with a 20 pound weight restriction. Jimmy Walker testified that even with a 20 to 30 pound lifting restriction, Petitioner could perform the jobs of switcher and forklift operator. Billy Zachary, a Roadway employee, testified that even with a 20 to 30 pound lifting restriction, he could perform the jobs of switcher and forklift driver. Zachary also testified that Petitioner had the seniority to bid and hold the forklift job.

Roadway's written job description has no lifting requirements. However, Roadway refused to accommodate Watkins and refused to allow Watkins to return to work.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the Fifth Circuit's decision conflicts with the holdings of this Court, the Sixth Circuit, other Fifth Circuit decisions, the Ninth Circuit, the Northern District of Georgia, and the Northern District of Texas.

Second, the Fifth Circuit's decision writes the ADA off the books.

U.S. Supreme Court Decision.

On May 29, 2001, the U.S. Supreme Court handed down its decision in *PGA Tour, Inc. v. Martin*, 2001 WL 567717 (2001). In discussing the ADA, the Court states that the ADA

was enacted to remedy widespread discrimination against disabled individuals. *PGA Tour*, p. 7. The Court continues by stating that one of the ADA's most impressive strengths is its comprehensive character and that it has been described as a milestone on the path to a more decent, tolerant, progressive society. *Id.*

In its decision, the Court found that Martin is an individual with a disability as defined in the Americans with Disabilities Act of 1990 where Martin's disability substantially limited his ability to walk an 18-hole golf course. *Id.*, p. 4. Watkins' disability is worse than Martin's, especially in light of the Social Security Administration's findings that Watkins was totally disabled.

Importantly, the Court held that the PGA's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability ran counter to the clear language and purpose of the ADA. *Id.* p. 13. To comply with the ADA, the Court found that an individual inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person. *Id.* In this case, Roadway witnesses admitted that they refused to make an individual inquiry and in fact did nothing to attempt to accommodate Watkins, in spite of Watkins' numerous requests to engage in the interactive process.

Sixth Circuit Decision.

The Sixth Circuit has found that under similar facts, the plaintiff was entitled to the protections of the ADA. In the case of *Ross v. Campbell Soup Company*, 237 F.3d 701 (6th Cir. 2001), the plaintiff had a lifting restrictions of

25 pounds. *Ross v. Campbell Soup Company*, 237 F.3d 701, 703 (6th Cir. 2001). The court found that the plaintiff was entitled to the protections of the ADA because the employer regarded the employee as significantly limited to his ability to lift or in his ability to work in a broad class of jobs.

Under such a holding, Watkins is entitled to the protections of the ADA. Roadway Express clearly considers Watkins to be disabled. George Helm, the terminal operations manager, testified that Watkins could not perform any job at Roadway Express with his limitations. Roadway Express has admitted that clerical positions are available, but apparently Roadway Express believed that Watkins' restrictions were such that he could not perform any class of job at Roadway. Furthermore, Roadway Express' policy that Watkins must be 100% healed and have no lifting restrictions before he could return to work shows that Roadway Express considered Watkins disabled.

Fifth Circuit Decision.

Watkins is disabled under previous Fifth Circuit holdings because Watkins is substantially limited in the major life activity of working if his back injury precludes him from a class of jobs or a broad range of jobs. *Dupre v. Charter Behavioral Health Systems of Lafayette Inc.*, 2001 WL 135306 (5th Cir. 2001), *citing Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Pryor v. Trane*, 138 F.3d 1024, 1027 (5th Cir. 1998). Watkins offered evidence that at the time he attempted to return to work with his doctor's release, he had been found to be totally and permanently disabled by Social Security. Such disability applied to any and every job. Furthermore, George Helm, the terminal operations manager for Roadway Express, testified that Watkins could not

perform *any* job at Roadway Express with his limitations. This would include any and all clerical jobs that were admittedly available at Roadway Express (Roadway Express, it its Motion to Modify Final Judgment, states that Roadway Express was now offering Watkins a clerical position, a position never offered to Watkins prior to the trial court's Order of Reinstatement).

Ninth Circuit Decision.

Regarding manual tasks, Watkins testified that he can no longer work on or do maintenance on his vehicles, can no longer haul hay, can no longer exercise or play basketball or softball, has problems sleeping, and can no longer engage in the same type of sexual relationship with his wife. Under holdings by the Ninth Circuit, sleeping, sexual relations, and interacting with others are ADA major life activities. *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), *opin. amended on den. of reh'g*, 201 F.3d 1211, *cert. den.*, 120 S. Ct. 2689 (2000). Under the Ninth Circuit decision, Watkins is entitled to the protection of the ADA.

Northern District of Georgia.

This case is identical on its facts to the case of *Frix v. Florida Tile Industries, Inc.*, 970 F. Supp. 1027 (N.D. Ga. 1997), where the court found that where an employee had a 25 pound lifting restriction, such employee was prevented from performing an entire class of jobs, and thus was substantially limited in the major life activity of working, so as to be disabled under the ADA.

"[A]n individual who has a back condition that prevents the individual from performing any heavy labor job [is] substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs." *Frix v. Florida Tile Industries, Inc.*, 970 F. Supp. 1027 (N.D. Ga. 1997), *citing* 29 C.F.R. § 1630, App. § 1630.2(j)(1996).

Under the holding of the Georgia Court, Watkins is protected by the ADA because he has a 20 pound lifting restriction and is prevented from performing an entire class of jobs.

Northern District of Texas.

In *Devine v. City of Dallas*, 2000 WL 21326 (N.D. Tex. 2000) (No. 3:97-CV-2990-BC), Magistrate Boyle found that the plaintiff had stated a claim for disability discrimination. In that case, the plaintiff injured his back while lifting a heavy person. The plaintiff was thereafter diagnosed with degenerative disk disorder and given a 7% permanent partial impairment rating. The plaintiff had lifting restrictions and applied for Social Security disability benefits, in which the plaintiff alleged that he was unable to work because of his disabling condition. The Court found that the plaintiff was a disabled person.

In Watkins' case, Watkins was diagnosed with permanent degenerative disk disorder, received a permanent 16% impairment rating, 20 pound lifting restrictions, and actually received Social Security benefits. Clearly, Watkins is disabled under the ADA.

100% Healed Policy Is a *Per Se* ADA Violation.

The record is full of references to Roadway Express' requirement that employees be 100% healed in order to return to work. Such a requirement flies in the face of the ADA. A 100% healed policy is a *per se* violation of the ADA as such a policy does not allow for a case-by-case assessment of an individual's ability to perform the essential functions of the individual's job, with or without an accommodation. *Heise v. Genuine Parts Company*, 900 F. Supp. 1137, 1154 n.10 (D. Minn. 1995); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998); *McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999). Individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices. *Sarsycki v. United Parcel Serv., Inc.*, 862 F. Supp. 336, 341 (W.D. Okla. 1995). Roadway Express refused to assess Watkins individually and refused even to discuss any reasonable accommodations that may exist.

In their testimony, Roadway Express' management proudly admitted that they have never let any employee return to work who was not 100% healed and had never accommodated a single worker. George Helm, terminal manager, testified that in 26 years he has never been involved in trying to make any sort of reasonable accommodations for any Roadway employee. Helm did absolutely nothing to try to accommodate Watkins. Helm flat out lied to Watkins in a letter in which he stated to Watkins that "If you consider yourself disabled or handicapped, Roadway is prepared to explore the topic of reasonable accommodations." Helm testified that he did absolutely nothing to explore such accommodations, even after being requested to do so by Watkins.

Don Kaltwasser, a terminal manager with Roadway Express at the time Watkins was injured, testified that he has worked at Roadway Express for 26 or 27 years and has never accommodated an injured worker. Kaltwasser stated that as long as Watkins had any restrictions whatsoever, he could not come back to work.

By finding that Watkins is not disabled, the Fifth Circuit has written the ADA off the books and allowed Roadway to discriminate at will against any employee who is not 100% healed. Roadway has never and will never engage in the interactive accommodation process provided for by the ADA unless this Court acts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 30, 2001

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-10065

JEFFREY D. WATKINS,

Plaintiff-Appellant Cross-Appellee,

v.

ROADWAY EXPRESS, INC.,

Defendant-Appellee Cross-Appellant.

Appeal from the United States District Court for the Northern District of Texas (3:99-CV-1893-M)

Before JONES, DeMoss, and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Defendant-Appellee Roadway Express, Inc. ("Roadway") appeals from the district court's denial of its motion for judgment as a matter of law following a jury verdict finding

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that Roadway had discriminated against Plaintiff-Appellant Jeffrey D. Watkins ("Watkins") on the basis of his disability. Because we find that Watkins is not disabled, he has not made out an actionable claim of discrimination under the Americans with Disabilities Act ("ADA"). The other issues raised by the parties are moot. We therefore reverse and render judgment in favor of Roadway.

BACKGROUND

Watkins was employed as a dockworker by Roadway, a trucking company, at its Garland, Texas, facility commencing in 1987. His job consisted primarily of the loading and unloading of freight of varying weights from trucks onto a loading dock. In June 1995, Watkins injured his back while loading freight at work. Following surgery, physical therapy, and various medical procedures, Watkins was given a medical release by his physician authorizing him to return to work with a 20-pound lifting/carrying restriction. Because of this restriction, Roadway did not return Watkins to duty. Roadway informed Watkins that all of the jobs on the docks required the ability to lift in excess of 20 pounds. This lawsuit ensued.

Following a trial, a jury found that Roadway had discriminated against Watkins because of his disability. The jury awarded Watkins $45,500 in compensatory damages and $450,000 in punitive damages. After an evidentiary hearing, the district court determined that Watkins was also entitled to an award of back pay in the amount of $58,024. Roadway moved for judgment as a matter of law. This motion was granted in part and denied in part: finding no evidence that Roadway acted with malice, the district court set aside

the jury's award of punitive damages but left the underlying finding of disability discrimination intact. Both parties appealed, raising several issues. One is dispositive.

DISCUSSION

Because the decision to deny a motion for judgment as a matter of law is a legal question, we review the district court's decision not to grant Roadway's motion de novo. However, we do so viewing the entire trial record in the light most favorable to the non-movant, Watkins, and drawing all reasonable factual inferences in Watkins's favor. *See Burch v. Coca-Cola*, 119 F.3d 305, 313 (5th Cir. 1997). We reverse a district court's decision not to grant a motion for a judgment as a matter of law only where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that [non-moving] party on that issue." *See id.*; Fed. R. Civ. P. 50(a)(1).

Governed by this standard, we hold that no reasonable jury could have concluded that Watkins was disabled within the meaning of the ADA. There is no dispute that Watkins's back condition constitutes an impairment. But not all impairments are serious enough to be considered disabilities under the ADA. To constitute a "disability," an impairment must "substantially limit" a "major life activity." *See Dupre v Charter Behavioral Systems*, 242 F.3d 610, 614 (5th Cir. 2001); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Appendix A

29 C.F.R. 1630.2(h) (2001).[1] A person is "substantially limited" if he is

> 1) Unable to perform a major life activity that the average person in the general population can perform; or
>
> 2) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(i).

As a matter of law, Watkins is not substantially limited in the performance of any major life activity. First, Watkins is not substantially limited in the major life activity of working because he is not significantly restricted in his ability to perform "either a class of jobs or a broad range of jobs in various classes . . ." 29 C.F.R. § 1630.2(h)(3)(I); *see also Sutton v. United Airlines*, 527 U.S. 471, 491 (1999). Further, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.3(j)(3)(I).

---

1. The ADA itself does not define either "substantially limits" or "major life activity," but the Equal Employment Opportunity Commission (EEOC) has promulgated regulations under the ADA defining these terms.

Appendix A

Here, the only work-related impact of Watkins's back injury was his inability to lift, in his own words, "real, real heavy" boxes. Despite the 20-pound lifting restriction imposed by his doctors, at the time of the trial Watkins was working full-time in a position with the Allen Independent School District that routinely required him to carry computer monitors and other equipment weighing up to 40 pounds. At trial, in response to the question "What can't you do?" Watkins answered that he could not "lift, you know, 200 or 300 pounds or — you know, I have weight restrictions." Watkins also testified that he could lift the "majority" of boxes handled by Roadway without difficulty, excluding only "extremely heavy ones" such as a "200 pound box [that is] eight foot tall." Watkins even demonstrated his still-potent post-injury lifting prowess before the trial court, hoisting without difficulty a pair of barbells weighing a combined 80 pounds over his head.

Watkins's employment as a manual laborer, his testimony as to his abilities, and his demonstrated lifting power combine to show that he is not precluded from all — or even most — jobs involving physical labor or activity. Watkins's impairment does not exclude him from any class of jobs or from a broad range of jobs in various classes. Watkins was not so impaired that he could not continue to earn a living as a manual laborer — indeed, he was earning his living in this manner at the time of the trial. On this basis, no reasonable jury could conclude that Watkins was significantly limited in the major life activity of working.

This conclusion is consistent with this court's decisions in previous ADA cases. We have held that a preclusion from

jobs involving "very strenuous physical activity, prolonged standing or sitting, heavy lifting, or prolonged walking" does not constitute a substantial limitation on working. *Dupre*, 242 F.3d at 615. This is because "[a]n inability to engage in the kind of intense physical exertion required of some jobs hardly disqualifies [the plaintiff] from all jobs involving manual labor." *Id.* Similarly, in *Sherrod v. American Airlines*, 132 F.3d 1112, 1120 (5th Cir. 1998), this court explicitly held that a restriction on heavy lifting was not alone sufficient to "demonstrate a significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes." Indeed, we indicated that a heavy lifting restriction disqualified the plaintiff from at most a "narrow range of jobs." *Id.*

Nor has Watkins demonstrated a substantial limitation in any other major life activity. A restriction on heavy lifting is not a disability in and of itself so long as the impaired person "can perform the normal activities of daily living." *Sherrod*, 132 F.3d at 1120. Watkins is not limited in performing any of the routine duties of daily living: he drives without assistance, walks without assistance, can groom and dress himself, can tie his shoes, works full time, engages in recreation and even plays 18 holes of golf on a regular basis.

Watkins does vaguely complain of a reduced ability (but not an inability) to enjoy sexual relations with his wife, but no medical testimony or other evidence substantiates his claim. This unsupported assertion is insufficient to permit a reasonable jury to find that Watkins suffers from a disability. *See Conteras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir. 2001) (holding that a plaintiff's bare assertion that an accident

prevented him from having sex as often as he had previously did not create an issue of fact as to the existence of a disability).

In short, because of the seemingly full and active life enjoyed by Watkins, no reasonable jury could conclude that he was substantially limited in any major life activity. Watkins was thus not disabled within the meaning of the ADA, and he has no action under that statute. We must REVERSE and RENDER a judgment in favor of Roadway.

REVERSED and **RENDERED**

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED DECEMBER 26, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:99-CV-1893-M

JEFFERY D. WATKINS,

Plaintiff,

v.

ROADWAY EXPRESS INC.,

Defendant.

FINAL JUDGMENT

Prior to trial, the Court granted the Motion for Summary Judgment of Roadway Express, Inc. ("Roadway") and held that Roadway was entitled to judgment as a matter of law on Plaintiff's claims for wrongful termination under § 451.001 of the Texas Labor Code and intentional infliction of emotional distress. It is therefore **ORDERED, ADJUDGED AND DECREED** that the claims of Plaintiff Jeffery D. Watkins against Defendant Roadway for wrongful termination under § 451.001 of the Texas Labor Code, and for intentional infliction of emotional distress, are **dismissed with prejudice**.

Appendix B

On the 6th day of September, 2000, a duly empaneled jury heard Plaintiff's claim for discrimination under the Americans With Disabilities Act, and Defendant's defenses. The jury returned its verdict in answer to special interrogatories, accompanied by instructions, all as part of the Court's Charge. The specific interrogatories, instructions and answers are set out in the Charge, but, in summary, the jury found that Plaintiff Jeffery D. Watkins proved he was a qualified individual with a disability, against whom Defendant Roadway intentionally discriminated by failing to provide him with a reasonable accommodation, and for whom the jury found $45,500 in compensatory damages. The jury further found that the accommodations sought would not create an undue hardship on Defendant, and awarded $450,000 in punitive damages.

On November 1, 2000, the Court held hearings on Defendant's Renewed Motion for Judgment and Plaintiff's Motion for Back Pay and Front Pay. The Court found that Plaintiff was a qualified person with a disability who was intentionally discriminated against by Defendant, entitling Plaintiff to compensatory damages of $45,500, based upon the jury's verdict. The Court further found that Defendant did not engage in one or more discriminating practices with malice or reckless indifference, and set aside the jury's verdict of $450,000.

The Court found that Plaintiff was entitled to receive back pay in the amount of $58,024. The Court further found that reinstatement was appropriate in lieu of front pay.

Appendix B

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that Plaintiff have and recover against Defendant Roadway Express for compensatory damages in the total amount of $45,500, and back pay in the amount of $58,024.

It is further **ORDERED, ADJUDGED AND DECREED** that Plaintiff be reinstated to the position of driver at Defendant's workplace at Garland, Texas, effective at a time of Plaintiff's choosing after the date of this Final Judgment, between January 8, 2001 and March 5, 2001, and that Plaintiff receive all pension, health and welfare benefits, vacation time, sick time and seniority credit that Plaintiff would have received had he been continuously employed by Defendant from June 29, 1995, to the date of this Final Judgment.

Defendant is further **ORDERED** to reasonably accommodate Plaintiff for such lifting restrictions as he presents to Defendant at least ten days before he reports for work. The parties shall confer and conduct a dialogue relating to such accommodations, but they shall include a minimum of access to forklifts, pallet jacks and hand carts.

The Court will decide Plaintiff's claim for attorneys' fees by a separate order. *See* FED. RUL. CIV. P. 54(d)(2). The Court deems the award of attorneys' fees to be a separate, collateral order on which the Court will enter judgment after ruling on Plaintiff's Application for Attorneys' Fees.

Court costs are taxed against Defendant. Plaintiff shall present a bill of costs to collect same.

Appendix B

Interest shall accrue on all amounts awarded in this judgment from the date of this judgment until paid at the rate of 6.052% per annum.

It is **FURTHER ORDERED** and **ADJUDGED** that any relief not expressly provided for herein is denied. This judgment is final for purposes of appeal.

SO ORDERED this 26 day of December, 2000.

s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

No. 01-736

IN THE

Supreme Court of the United States

JEFFERY D. WATKINS,

Petitioner,

v.

ROADWAY EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Roadway Express, Inc. is a wholly owned subsidiary of Roadway Corporation which is publicly traded.

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REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether Jeffrey D. Watkins ("Watkins" or "Petitioner") is disabled under the Americans with Disabilities Act ("ADA"). As the Fifth Circuit correctly held, the evidence at trial established that Watkins is not substantially limited in any major life activity and therefore is not entitled to the protections of the ADA. Watkins ignores the case specific, fact intensive analysis for determining disabled status under the ADA, and his reliance on the case law cited in his Petition is misplaced. There is no conflict between the Fifth Circuit's decision in this case and the precedent cited by Watkins because, unlike the plaintiffs in those cases, Watkins failed to present evidence of any major life activity in which he was substantially limited.

Moreover, Watkins' Petition and his characterization of the issues and evidence distorts the record on appeal. The Fifth Circuit granted judgment in Roadway's favor because Watkins failed to show that he was disabled under the ADA. This case was not tried as a "regarded as" disabled or a "record of" disability case. In addition, some of the factual assertions in Watkins' Petition were not in the record on appeal.

Finally, the determination of when a person is disabled under the ADA is by no means an unsettled area of law. To the contrary, Watkins complains about the law's application to him based on the evidence presented at trial. Thus, this case presents no issue of national importance and no unresolved issue of law. Accordingly, because the evidence at trial established as a matter of law that Watkins is not disabled, the Fifth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I.

THE RECORD REGARDING WATKINS' LIMITATIONS

The determination of whether a person is substantially limited in a major life activity so as to qualify for protection under the ADA requires a case specific, fact intensive analysis. *Sutton v. United Airlines, Inc.*, 528 U.S. 471, 562 (1999). Neither the classification of an impairment nor the treatments associated therewith are determinative. Rather, an ADA plaintiff's burden is to identify a major life activity in which he is substantially limited.

In this case, the evidence established that:

- Watkins, through his physical demonstration in the court room, was able to lift two barbells weighing 80 pounds over his head without difficulty.

- Watkins could perform all of the jobs on Roadway's dock including, as alleged in Watkins' Petition, the forklift driver job, the switcher job, the dock worker job, and the "drop and hook" job.

- Watkins could move, adjust and manipulate, without assistance, freight weighing 50 pounds or more.

- Watkins could always carry on the day-to-day routines of living and plays golf recreationally.

The best Watkins could do at trial was to testify that he can no longer perform maintenance on his vehicles, cannot play basketball or softball, has some problems sleeping and

was "restricted somewhat as to what type of relationship [he can] have with [his] wife." Such testimony does not, as a matter of law, establish a substantial limitation in a major life activity. *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998) (participation in sports activities not a major life activity); *Coker v. Tampa Authority*, 962 F. Supp. 1462, 1465 (N.D. Fla. 1997) (plaintiff who was unable to participate in recreational activities not disabled as a matter of law); *Contreras v. Suncast Corp.* 237 F.3d 756, 764 (7th Cir. 2001) (bald assertions of reduced sexual capacity not sufficient to establish disabled status).

Watkins was able to return to the work force at least as of July 1997, less than two years after he last performed services for Roadway in October of 1995. When Roadway refused to reinstate Watkins due to his medical restrictions in July 1997, Watkins obtained a job as a computer technician. In addition, after the district court's judgment, Roadway reinstated Watkins and, after passing a return to work physical, he continues to this day to work for Roadway as a driver/dock worker.

At most, Watkins was able to show that he had a temporary, nonchronic impairment that was largely, if not completely, corrected by surgery. A surgery related absence and short term working restrictions thereafter do not constitute a disability under the ADA. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758-59 (5th Cir. 1996); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997); *McDonald v. Pennsylvania Dept. of Public Welfare*, 62 F.3d 92, 95-97 (3d Cir. 1995).

Watkins' assertion that the Social Security Administration found him "permanently" disabled is a distortion of the

record. Watkins has been working since October of 1997 and testified that, as of July 1997, he was able to perform all of the functions on Roadway's dock. Moreover, the determination of disabled status for social security purposes is not the same as under the ADA. *Cleveland v. Policy Mgt. Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999). Indeed, applying for disability benefits with the Social Security Administration generally serves to bar a claim under the ADA. *See, e.g., Marinelli v. City of Erie, Pennsylvania*, 216 F.3d 354, 366 n.8 (3d Cir. 2000); *Feldman v. American Memorial Life Insurance Co.*, 196 F.3d 783, 791 (7th Cir. 1999).

II.

THE CASE LAW CITED BY WATKINS IS INAPPOSITE

PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 2001 WL 567717 (2001), is irrelevant to this case. *Martin* was decided under the public accommodations provisions of Title III of the ADA; this is a Title I employment action. Moreover, and more significantly, the Court in *Martin* did not address Martin's disabled status, as that issue was apparently conceded by the PGA. Accordingly, the Court, unlike the Fifth Circuit in this case, made no finding as to Martin qualifying for protection under the ADA.

Watkins also cites cases where plaintiffs with conditions superficially similar to his were found to be disabled and reasons that the Fifth Circuit's ruling conflicts with these cases. No conflict is raised, however, as the plaintiffs in the cases cited by Watkins were able to do what Watkins could not — produce evidence to establish a limitation of one or

more major life activities. *See, e.g., McAlindin v. County of San Diego,* 192 F.3d 1226, 1234-35 (9th Cir. 1999) (plaintiff able to point to substantial evidence of an inability to engage in sexual relations, an inability to sleep and an inability to interact with others); *Frix v. Florida Tile Industries, Inc.*, 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (plaintiff able to show that he was substantially limited in the major life activity of working — although in reaching such holding, the court expressly rejected precedent from the Fourth, Fifth and Eighth Circuits); *Devine v. City of Dallas*, 2000 WL 21326 (N.D. Tex. 2000) (plaintiff unable to do housework, lift, bend, twist, care for his children, go up and down stairs more than once, or get any type of sustained sleep). Thus, there is no conflict between the Fifth Circuit's decision and the cases cited by Watkins.

III.

WATKINS' LEGAL END OR FACTUAL MISSTATEMENTS

Watkins argues throughout his Petition that he was "regarded as" disabled by Roadway and that he had a "record of" disability. These are separate protected classes of covered individuals under the ADA. At trial, the district court properly refused to submit evidence or instructions as to whether Watkins was "regarded as" disabled or had a "record of" disability as these theories of coverage had not been pled and because there was no evidence that Watkins qualified for protection under these theories. Significantly, Watkins did not appeal this ruling and did not raise the issue in his briefs to the Fifth Circuit. The *only* issue submitted to the jury and decided by the Fifth Circuit was whether Watkins was disabled under the ADA. Accordingly, *Ross v. Campbell*

Soup Co., 237 F.3d 701 (6th Cir. 2001), cited by Watkins, has no application as the court in that case reviewed the record to determine whether or not the plaintiff was regarded as disabled.

In addition, contrary to Watkins' assertions, there was no evidence at trial of any light duty openings or the existence of clerical work. While the parties did discuss *after* the entry of judgment the possibility of providing Watkins with clerical work as a means of accommodating him, there was no evidence of the availability of such work and no issue presented to the jury. In any event, the availability of light duty work is entirely irrelevant to the issue of whether Watkins is disabled.

Similarly irrelevant are Watkins' allegations regarding Roadway's supposed "100% healed" policy and Roadway managers' lack of experience in accommodating employees. In addition to distorting the record, these matters are irrelevant to the issue — Watkins' disabled status — decided by the Fifth Circuit. Because Watkins is not disabled, the Fifth Circuit quite properly never reached the issue of Roadway's alleged failure to accommodate him.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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